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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 345

NATIONAL HOSPITAL SERVICE SOCIETY, INC.,
Petitioner,

v.

ALBERT F. JORDAN, SUPERINTENDENT OF INSURANCE, GOVERNMENT OF THE DISTRICT OF COLUMBIA,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
Attorneys for Respondent.

CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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COUNTER STATEMENT OF CASE

At the conclusion of the trial below, the trial justice entered findings of fact, none of which is challenged by petitioner. These findings (R. pp. 23-26) are in substance as follows:

That, as of the date this suit was filed, four of the five directors of petitioner corporation were members of the Stover family; that each applicant for membership in the petitioner corporation was required to assign, by a proxy agreement, his rights to participate in the government of the petitioner corporation to a designated official of that corporation; that W. H. M. Stover had entered into an agreement with that

corporation to serve as general manager, by the terms of which agreement "he was granted full and exclusive control and custody over all the affairs and funds of the said Society"; that it was also provided in that agreement that "so long as he shall be retained as general manager he shall receive as compensation for his services rendered in this capacity 35% of all insurance dues which may be paid in in the said Society;" that applicants over the age of fifty-five years were accepted for membership as of the time of filing suit; that only insurance beneficial memberships were available; that provision for payment of death benefits was qualified by a restriction to the effect that payment thereof would be made only when in the opinion of the Board of Directors such payment would not reduce the reserves of petitioner corporation beyond a safe margin; that petitioner corporation did not require medical examinations of applicants for life benefits but simply retained the right to such an examination; that certain advertisements placed in local newspapers and distributed by means of cards thrown in doorways advertised the sale of noncancellable insurance; that all of petitioner's policies are cancellable during the first five years of the policy; that the only initiation prescribed by the petitioner is the filling out of an application by an applicant and the tendering of the application with his initiation fee and one monthly premium; that, when the application has been accepted by the petitioner corporation, the officers of the petitioner corporation consider the member has been initiated; that the ritual was reported lost or misplaced as of March 28, 1940; that there was no record of or any reference to or consideration of the ritual between the time W. H. M. Stover first became associated with petitioner corporation on March 8, 1938, until March 28, 1940, and that no restrictions exist in petitioner corporation as to race, creed or color.

The trial Court found as a matter of law (R. pp. 26, 27) that the Superintendent of Insurance for the District of Columbia (respondent here) was not estopped by reason of the actions

of prior Superintendents of Insurance to deny petitioner corporation a license; that the burden is upon the petitioner, seeking to compel the issuance of the license, to show that it was entitled to a license under the law; that petitioner association was not carried on for the sole benefit of its members and their beneficiaries; that petitioner corporation has failed to show that it is not operated for profit; that petitioner has no real lodge system or ritualistic form of existence and the system it had was merely a pretext; that petitioner has no representative form of government; that petitioner has no real binding provisions for the payment of benefits in the case of death; that applications for beneficial membership were accepted from persons whose age exceeded fifty-five years, and that no real medical examination is required of applicants for life benefits.

None of the conclusions of law of the trial Court was challenged by petitioner in the Court of Appeals except the first, which is, in substance, that the respondent is now estopped by reason of the actions of prior Superintendents of Insurance to deny petitioner a license.

During the trial of the case, when counsel for petitioner offered testimony relative to the question of estoppel, the following colloquy occurred (R. pp. 9, 10):

> "The Court: I think the only thing I will hear is testimony as to whether or not the plaintiff does come within the provisions of this Statute. As to what came on before that, counsel for plaintiff may state what he expects to prove and I will exclude it. The question before me now is whether the plaintiff does come within the provisions of this Statute.
>
> "Mr. Doherty: Your Honor would not permit me to show, by letters and testimony, that Mr. Moor, who was the then Superintendent of Insurance, construed this Statute and told Mr. Stover just what to do at the time he took over the organization?

"The Court: You may tender that proof, but I will exclude it. You may proceed."

The only testimony set forth in the agreed statement of facts (R. pp. 10-19) is that which relates to the question of estoppel.

Respondent respectfully invites attention to the statement made by petitioner on pages 2 and 3 of its brief to the effect that "the condition of the society, insofar as it referred to the initiation of members, medical examinations, death benefits, lodge and ritualistic work, was practically the same in March of 1938, as it was on the 20th day of May, 1940, when the bill of complaint was filed". This statement is misleading. It implies that provisions were made for the initiation of members, for medical examinations and death benefits and lodge and ritualistic work. The agreed statement of fact on this subject (R. p. 10) is to the effect that the status of the society with respect *to the provisions of law* relating to the initiation of members, medical examinations, death benefits, and lodge and ritualistic work, were substantially the same on the two dates mentioned.

There is nothing in the record to support the statement found on page 4 of the petition "that the Superintendent of Insurance had knowledge concerning these outstanding claims ($15,000) against the Society, but which he did not disclose to the witness", nor is there anything in the agreed statement of facts to support the insinuation that the slip of paper in the handwriting of J. Balch Moor, which showed the following breakdown (R. p. 13):

"Reserves	$ 2,500
Claims pending	700
Surplus	510
making a total of	$ 3,510"

was any representation of Moor to Stover. One might equally well conclude from the agreed statement of facts that the

figures noted in Moor's handwriting had been furnished by Stover himself.

The statement found on page 4 of the petition to the effect that J. Balch Moor had written the Commissioner of Insurance at Baltimore, Maryland, to the effect that the petitioner society complied with the fraternal laws of the District of Columbia, is not supported by a reading of that letter (R. pp. 15-17). The letter clearly states that "Mr. Stover has recently contributed considerable money and paid many claims which I considered as unfair, in order to build up to a point where *it can be converted into a mutual insurance company and surplus contributed as required by law to operate as a mutual company in the District of Columbia.* Under the circumstances I trust that you will reconsider your decision and grant this society the privilege of operating in your State until the end of the present license year, June 30th, at which time, if the society has not fully met the requirements of your Code and are converted into a mutual company satisfactory to you, that they will voluntarily withdraw from your state." (Italics supplied.)

There is nothing in the agreed statement of facts to support the allegation in the concluding paragraph of petitioner's statement of the case found on page 4 that "it was not until all the outstanding obligations against the society were actually taken care of, and the society placed on a basis of 'pay as you go', that it was refused a permit to do business in the District of Columbia and threatened with prosecution for doing business without having obtained a permit to do so." This statement that the outstanding obligations of petitioner have been taken care of is negatived by the great emphasis and stress laid by petitioner on its financial obligation to the Stover family in the amount of $39,000.

STATUTES INVOLVED

Section 35-901 of the Code of Laws of the District of Columbia (1940 ed.), Sec. 749, D. C. Code of 1901, as amended Dec. 20, 1928, 45 Stat. 1055, c. 40:

> "A fraternal beneficial association is hereby declared to be a corporation, society, order, or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having *a lodge system with ritualistic form of work and representative form of government,* making provision for the payment of benefits in case of death. * * *" (Italics supplied.)

Section 35-907 of the Code of Laws of the District of Columbia, (1940 ed.), Sec. 755, D. C. Code of 1901:

> *"Any nine or more persons,* at least one-third of whom shall be residents of the District of Columbia being desirous of forming a fraternal beneficial association for the purposes set forth in section 35-901 may associate themselves together and effect such organization as hereinafter prescribed, and not otherwise. Such person shall make, sign, and acknowledge before any officer authorized to take the acknowledgment of deeds in this District and file in the office of the recorder of deeds of said District a certificate of declaration in writing, to be recorded in a book kept for that purpose and open to public inspection, in which shall be stated the name or title by which said association shall be known to law; * * * the name or official title of the officers, trustees, representatives, or other persons by whatever name or title designated, who are to have and exercise the general control and management of its affairs; the place of doing business defined; the limit as to age of applicants for beneficial membership, which shall not exceed fifty-five years, and that medical examinations are required of applicants for life benefits, * * *. The as-

sociation shall elect from its members trustees, directors, or managers, by whatever title known in its laws, at such time and place and in such manner as may be specified in its laws, who shall have the control and management of the affairs and funds of said association, a majority of whom shall be a quorum for the transaction of business; and whenever any vacancy shall happen among such trustees, directors, or managers, by death, resignation, or otherwise, such vacancy shall be filled in such manner as shall be provided by the laws of said association." (Italics supplied.)

Section 35-916 of the Code of Laws of the District of Columbia, (1940 ed.), Sec. 764, D. C. Code of 1901, as amended Dec. 12, 1928, 45 Stat. 1021, c. 24:

"Nothing in this chapter shall be construed to apply to any corporation, * * * or societies that do not have as their principal object the issuance of benefit certificates of membership in case of death or the payment of sick, funeral, or death benefits exceeding in amount $100."

SUMMARY OF ARGUMENT

This case presents no question of general importance.

The question of whether the statute provided for the issuance of perpetual or annual permits was not presented to the United States Court of Appeals for the District of Columbia.

Petitioner society has operated since its present secretary-treasurer and general manager became an officer on March 8, 1938, in clear violation of the express provisions of existing law, in that it has been operated without representative government, for profit, not for the sole benefit of its members, without a lodge or ritualistic form of existence and has sold insurance beneficial memberships to applicants over fifty-five years of age and has not required medical examinations of applicants for life benefits and has not

furnished any real binding provisions for the payment of benefits in case of death. Petitioner contends that, even though such facts admittedly exist, the present Superintendent of Insurance (respondent here) should be estopped to refuse to issue a license to petitioner simply because of the conduct of his predecessor in issuing said license. It is the position of the respondent that such a contention has no basis in law. Estoppel can be raised only when the party claiming it has with legal justification relied on a certain course of conduct. Here the element of justifiable reliance is lacking. Petitioner is presumed to know the law. In this instance there was no opportunity for any discretionary interpretation.

Respondent also invites attention to the fact that petitioner is seeking to control the action of the Superintendent of Insurance by mandatory injunction. Mandatory injunction is essentially the old action of mandamus. Decisions of this Court clearly show that such a writ is controlled by equitable principles. It is not a writ of right but rests in the sound discretion of the Court. It is never issued where the effect of its issuance will be to work a public mischief. Petitioner, in plain terms, is seeking to have this Court perpetuate a clear and unwarranted violation of existing law, to the detriment of the general public and of other insurance companies operating strictly under the terms of the statute.

ARGUMENT

I

This case presents no question of general importance.

This case presents no question of general importance which should be decided by this Court. The decision in the United States Court of Appeals for the District of Columbia is in complete harmony with the decisions of this Court and the decisions in the various United States Circuit Courts of Appeal. Petitioner seeks to invoke a construction of section 754

of the 1901 Code of the District of Columbia in that it contends that under this section it was the duty of the Superintendent to grant a perpetual permit. The trial court found as a matter of law (R. p. 26) as follows:

> "2. The plaintiff corporation, having applied for and received and accepted an annual license, cannot contend that its license is a perpetual or perennial license;"

Petitioner did not present the correctness of this finding to the United States Court of Appeals for the District of Columbia for review and, indeed concedes on page 9 of its brief filed in this Court "that the only matter which was presented to the United States Court of Appeals for the District of Columbia was the exclusion of certain testimony covering acts of prior superintendents of insurance of the District of Columbia."

II

Respondent is not estopped to refuse a permit and the Court of Appeals properly excluded testimony of the acts of prior superintendents of insurance.

It appears from the findings of fact of the trial Court, the correctness of which is not challenged by petitioner, that petitioner is operating its business in clear violation of law. Petitioner makes no contention that it is entitled to write insurance in the District of Columbia unless it is entitled to a license as a fraternal beneficial association. Petitioner further concedes, as it must concede in view of the findings of fact of the trial Court, that its activities do not conform with the requirements of the Fraternal Beneficial Association Statute. Petitioners only contention is that, since prior Superintendents of Insurance have licensed petitioner to do business in viola-

tion of law, respondent must do likewise. Therefore, the only question in this case is whether the present Superintendent of Insurance, because of the actions of his predecessors in office in issuing petitioner licenses in violation of the express terms of the statute, is estopped to deny petitioner a license.

Petitioner misconceives the nature of the doctrine of estoppel. This doctrine can only be invoked by one who has relied upon, and has had a right to rely upon, the action of the person against whom the estoppel is asserted. In the case of *Bloomfield* v. *Charter Oak National Bank*, 121 U. S. 121, 30 L. Ed. 923, this Court, in holding that a town was not estopped to set up the invalidity of a contract entered into by it, said (p. 135):

> "And no estoppel *in pais* can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon."

In this case petitioner knew, or should have known, that it was not complying with the provisions of the statute under which it sought to be licensed and that any license issued to it to operate under these circumstances would be issued in violation of law. The doctrine of estoppel cannot be invoked to make valid that which the law prohibits. As was said by this Court in the case of *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 213:

> "The petitioner, who was chargeable with knowledge of the prohibition of the statute, may not invoke an estoppel to impose a liability which the statute forbids. Texas & Pacific Ry. Co. v. Pottorff, 291 U. S. 245, 260; California Bank v. Kennedy, 167 U. S. 362; Concord First National Bank v. Hawkins, 174 U. S. 364, 369; First National Bank v. Converse, 200 U. S. 425, 439; Merchant's National Bank v. Wehrmann, 202 U. S. 295, 302."

Referring to that case, this Court in *Oppenheimer* v. *Harriman*, 301 U. S. 206, 211, said:

> "The purchaser, chargeable with knowledge of the statute, could not invoke estoppel."

Petitioner cites three decisions of this Court: *Essex* v. *New England Telegraph Company*, 239 U. S. 313; *City Railway Company* v. *Citizens Railroad Company*, 166 U. S. 557, and *County of Randolph* v. *Post*, 93 U. S. 502, and implies that these decisions sustain its position to the effect that the Superintendent of Insurance should be estopped to deny a license to the petitioner by reason of the actions of prior Superintendents of Insurance. In those cases the action of the municipal authorities there involved was in conformity with their authority to act. That essential fact is lacking in the instant case.

The United States Court of Appeals for the District of Columbia has uniformly applied the rule that any action of a municipal officer taken in violation of law is a nullity, even though acted upon by the opposite party. In the case of *Berry* v. *District of Columbia*, 32 App. D. C. 96, one Berry requested the Commissioners to permit him to erect a building to a height in excess of that permitted by the building regulations This permission was requested in advance of applying for a building permit, so that plaintiff might make his financial arrangements before deciding upon his building plans. Relying upon the permission granted, Berry paid out sums of money for the drawing of his plans and the procuring of contracts for the erection of the building. He then made application for a building permit, which was denied by the Inspector of Buildings on the ground the height of the proposed building exceeded the height permitted by the regulations. This action of the building inspector was then approved by the Commissioners. Berry brought suit against the District to re-

cover the monies expended. The Court, in denying recovery, said (p. 105):

> "What the commissioners were asked to do in the letters aforesaid was to interpret sec. 40 in advance, so that plaintiff might make his financial arrangements before deciding upon his building plans. As we have seen, the section is too plain to require interpretation. The action taken by the commissioners was a palpable misconstruction, and amounted to nothing more than a virtual suspension of the regulation by way of excepting plaintiff's property from its operation. They are not judicial officers invested with the power to make interpretations of their regulations, upon the petition of parties, but ministerial officers invested with the power to make certain general regulations, and then to enforce them without favor. Their action, being without authority, the plaintiff assumed the risk of incurring expenses on the faith of it."

To the same effect, see also:

Weeks v. *Heurich,* 40 App. D. C. 46, 56;
District of Columbia v. *Wilson,* 44 App. D. C. 265;
Hazard, et al v. *Blessing, et al,* 55 App. D. C. 114, 2 F. (2d) 916.

Petitioner, however, contends that a different rule has been announced by that Court in the later case of *District of Columbia* v. *Cahill,* 60 App. D. C. 342, 54 F. (2d) 453. That case, however, did not involve the issuance of a permit in violation of law, but the issuance of a permit through an error of fact which fact was determined by an officer vested with authority to make such determination. In that case one Cahill wished a certificate of occupancy to use as a garage certain premises in a district zoned residential. Under the zoning regulations such use was prohibited unless the building had been so used since prior to the adoption of the regulations. Cahill contended,

in good faith, that it had been so used. The building inspector, after an investigation of the facts, agreed with Cahill and issued a certificate of occupancy for a non-conforming use. After Cahill, relying upon the issuance of the certificate, had expended large sums of money, the District undertook to revoke the certificate on the ground that the facts were not as found by the building inspector. The Court held that as the building inspector had determined the facts in favor of Cahill, as he had authority to do, the District was estopped from claiming the facts to be otherwise. The grounds of the decision are set forth in the opinion as follows (p. 343):

> "Under section 6 of the Zoning Act of March 1, 1920, supra, *appellee was lawfully entitled to the permit and certificates in question,* if, at the time of the passage of the act, the first floor of the building was in lawful use as a garage, although such use did not conform with the provisions of the act or of the orders and regulations adopted under it. When appellee in good faith presented his application to the inspector of buildings, it became the duty of that officer to ascertain whether the facts justified the granting thereof. See Building Code of the District of Columbia, section II, part 1, A. The inspector made an investigation and decided that the application should be granted; he accordingly issued the permit and certificates in due form to appellee and lessees, and nothing appears in the record to show that this duty was not correctly and honestly performed. * * *." (Italics supplied.)

In this case it is not the duty of any Superintendent of Insurance to authorize the conduct of an insurance business in violation of law. On the contrary it is his duty to refuse a license under such conditions. Furthermore, in the Cahill case the property owner was mislead by the finding of the Building Inspector as to a matter of fact. Here, petitioner could not have been mislead by the action of the prior Superintendent of In-

surance, since petitioner is charged with a knowledge of the law and knew that the business it was conducting did not comply with the requirements of the statute.

The decisions in the United States Circuit Courts and Circuit Courts of Appeals cited by petitioner require no extended discussion, as they are clearly limited to cases where municipalities were held estopped as to matters within the scope of their powers and the powers of their officers. Here, no officer of the District of Columbia had power to issue a permit to an association to operate as a fraternal beneficial association, unless it complied with the statute.

An examination of the State cases on the general principle of estoppel applicable to the facts raised by the issues in the instant case discloses ample authority for the position taken by the Courts below. An early case on the subject, but one still cited with approval as a leading case, (see 21 C. J. 1193, note 26) is that of *Seeger* v. *Mueller, et al.*, 133 Ill. 86, 24 N. E. 513, where the Court said (p. 515):

> "* * * But the rule is different where the plat is made by municipal officers whose powers in the premises are limited and defined by statute. No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or mislead by acts done without legal authority."

The recent decision of the Maryland Court of Appeals in *Lipsitz* v. *Parr*, 164 A. 743, 164 Md. 222, presents a searching analysis on the general subject of municipal estoppel. In that case the facts were that one Lipsitz obtained a permit from the appropriate city officials of Baltimore to erect a building in which to manufacture ice. The words of the permit unquestionably granted plaintiff a permit to erect an ice manu-

facturing building and carried an endorsement that the use of the land and structure applied for was in conformity with the provisions of zoning regulations approved March 30, 1931. The land, however, was actually in the second commercial use district, in which an ice factory was prohibited. Plaintiff was notified by an official letter, dated January 21, 1932, that the permit was revoked. In the meantime plaintiff had proceeded with the erection of a plant, pursuant to the permit theretofore issued. The Court said (p. 745):

> "A municipality may be estopped by the act of its officers if done within the scope and in the course of their authority or employment, but estoppel does not arise should the act be in violation of law. Paragraph 31 of the ordinance forbade the officials of the municipality to grant the permit which the plaintiff asked and obtained; and paragraph 41 made it a misdemeanor for the plaintiff to use his premises as a factory to make ice as the invalid permit purported to empower.
>
> "* * * A permit thus issued without the official power to grant does not, under any principle of estoppel, prevent the permit from being unlawful nor from being denounced by the municipality because of its illegality. In the issuance of permits pursuant to the ordinance at bar, the municipality was not acting in any proprietary capacity nor in the exercise of its contractual powers, but in the discharge of a governmental function through its public officers of limited authority, and the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment. *Every one dealing with the officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority.*" (Italics supplied.)

The clear weight of authority is that where the action of the municipality or its officers is ultra vires, the municipality cannot thereafter be estopped to deny its consent. The annotation in 89 A. L. R. 619 (c), includes a number of cases supplementing the annotation in 7 A. L. R. 1249, relating primarily to street franchises. The language there stated is as follows:

> "As stated in the earlier annotation, if the franchise rights claimed are ultra vires the municipality, it cannot be estopped from denying that it consented thereto."

In the case of *Holland Realty and Power Co.* v. *St. Louis* (1920), 282 Mo. 180, 221 S. W. 51, the rule was laid down that when consent to use a city's public ways can be obtained only from its own Legislative Assembly, and in a particular mode (in this case by an ordinance), the administrative officers cannot waive the necessity of procuring consent from the Assembly and in the prescribed mode, and they cannot, by acquiescing in the use of a public way by a utility corporation, estop the municipality from terminating the use.

There is a further annotation in 119 A. L. R. 1512 relating primarily to zoning or fire limit regulations, to the following effect:

> "Most of the cases are to the effect that a municipality is not precluded from enforcing a zoning or fire limit regulation by the fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening the terms of such regulation; and this notwithstanding that the holder of the permit has proceeded thereunder to his detriment before the municipality seeks to enforce the regulation against him."

In conclusion, it is respectfully submitted that when one claims estoppel it is incumbent upon him to show, as one of the

basic elements, lack of knowledge and of the means of knowledge of the truth as to the facts or requirements in question, 19 Am. Jur. 643. Petitioner was chargeable with knowledge of the requirements of law as to the organization and conduct of a fraternal beneficial association. When it acts as it did in this case in clear contravention of the requirements of law, it cannot thereafter avail itself of the principle of estoppel.

Petitioner relies on two state decisions which, it is respectfully submitted, can be readily distinguished.

In the case of *State ex rel Caldwell* v. *Lincoln St. Ry. et al.*, 80 Neb. 333, 114 N. W. 422, a statute required that a company wishing to construct and operate a street railway in any municipality of the State must file articles of incorporation specifying the termini of such railway and the street or streets through which it is proposed to be constructed and operated, which articles must be approved by the electors of the municipality. A company filed articles of incorporation which had been approved by the electors, which articles named all of the streets of the municipality as the streets upon which the railway was to be constructed and operated. After certain lines of railroad had been constructed, the city, through the county attorney, undertook to question the validity of the franchise on the ground that the statute did not authorize the granting of the right to use all of the city streets. The court agreed with the contention of the city as to the construction of the statute, but held the city was estopped to question the grant as to the lines already established. It will be noted, however, that the city, under the statute, had the power to approve the grant to the extent to which it had been acted upon.

The facts presented by *State ex rel. Washington Paving Company* v. *Clausen,* 90 Washington 450, 156 P. 554, also relied upon by petitioner, establish a situation which furnishes no authority for the proposition on which petitioner depends. In that case the State highway authorities, although they knew of the deviation of one with whom they had entered into

a contract from the specifications of that particular agreement, nevertheless did nothing about it, but on the contrary reaped the benefits of this contractor's labor. Thereafter, on the theory that the contractor had availed himself of a secret price on the material which he had used in the contract, they sought to avoid payment under the contract. We see nothing in this case that establishes any principle that benefits petitioner. The municipal authorities, who had authority to enter into such contract, simply failed to void the contract when they were apprized of the conduct of the contractor. Having availed themselves of the benefits of the contract, the Court ruled that they were liable for payment under the contract. No permit or license was involved in any stage of the proceedings.

III

Relief cannot be granted when opposed to the public interest.

If petioner is granted the relief prayed and is licensed as a fraternal beneficial association, the result will be that it can carry on its business of selling insurance to the public generally without having placed around it the safeguards which Congress has deemed essential for the protection of policy holders. Section 749 of the Code of 1901, as amended December 20, 1928, section 35—901, D. C. Code of 1940, with respect to a fraternal beneficial association, says—"Such association shall be governed by this subchapter, and shall be exempt from the provisions of insurance laws of the United States relating to the District of Columbia, and no law hereafter passed shall apply to them unless they be expressly designated therein:" The statutes relating to fraternal beneficial associations contain no requirement that the associations shall maintain any reserves (unless they write insurance or annuities upon the lives of children, Act of May 29, 1928, 45 Stat. 953, secs. 35—918 to 35—921, D. C. Code of 1940). The Superintendent of Insur-

ance has no control over these associations after a license has been issued except to require, under the provisions of section 762 of the Code of 1901, sec. 35—914, D. C. Code of 1940, the filing of an annual report. Even though the report discloses the association is in a serious financial condition the superintendent can take no action. At the time this suit was filed a company engaging in a business such as petitioner is engaged in would be required to comply with the provisions of the Marine Insurance Act of March 4, 1922, 42 Stat. 401, secs. 35—1100 to 35—1132, D. C. Code of 1940. Under sections 3 and 4 of this Act the company is required to have a certain capital or surplus, and reserves. Section 18 of the Act limits the types of securities in which the company may invest its capital and surplus. Under section 654 of the D. C. Code of 1901, as amended September, 1916, section 35—1201, D. C. Code of 1940, the representatives of insurance companies must be licensed. Under section 647, as amended, of the D. C. Code of 1901, section 35—103, D. C. Code of 1940, every insurance company is required to publish an annual statement of its true financial condition in a daily newspaper in the District of Columbia.

Subsequent to the institution of this suit Congress, on October 9, 1940, passed the Fire and Casualty Act of the District of Columbia, 54 Stat. 1063, sections 35—1301 to 35—1350, D. C. Code of 1940 which set up a comprehensive code for the control and regulation of the business of insurance in the District of Columbia. Licensed fraternal beneficial associations were exempt from all of these requirements of law because Congress evidently felt that such organizations were not engaged in competition with commercial companies; that their insurance activities would be subordinate to their fraternal activities, and that the policy-holders' real protection lay in the bond of fellowship between the individual members, in the required representative form of government, and in the prohibition of operations for profit. In this case petitioner is a fra-

ternal beneficial association in name only. In fact, it is engaged in a commercial business in open competition with companies duly licensed as such and subject to the requirements of law pertaining to them. To permit petitioner to carry on its business free of the safeguards which Congress deems essential to the protection of policy-holders would work a public mischief.

It is well settled that the rules governing the issuance of writs of mandamus and mandatory injunctions are the same.

United States v. *Mellon*, 59 App. D. C. 24, 32 F. (2d) 415, certiorari denied 280 U. S. 561;
Moore v. *Heany*, 34 App. D. C. 31;
McKenzie v. *Fisher*, 40 App. D. C. 74;
U. S. ex rel Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316.

It is equally well settled that neither a writ of mandamus nor a mandatory injunction will issue if it will work a public injury or embarrassment or be prejudicial to the public interest.

In the case of *Greathouse* v. *Dern*, 289 U. S. 353, this Court said:

> *"The court, in its discretion, may refuse mandamus to* compel the doing of an idle act, *Turner* v. *Fisher, supra,* 209; *Wilson* v. *Blake,* 169 *Cal.* 449; 147 Pac. 129; or *to give a remedy which would work a public injury or embarrassment, (see Duncan Townsite Co.* v. *Lane, supra; Arant* v. *Lane, supra; Effingham, Maynard & Co.* v. *Hamilton,* 68 Miss. 523; 10 So. 39; cf. *Matter of Lindgren, supra,* 66; *McCarthy* v. *Street Comm'rs, supra) just as in its sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.* See *Seaboard Air Line Ry. Co.* v. *Atlanta B. & C. R. Co.,* 35 F (2d) 609; *Conger* v. *New York, W. S. & B. R. Co.,* 120 N. Y. 29; 23 N. E. 983; *Clarke* v. *Rochester, L. & N. F. R. Co.,* 18 Barb. 350; *Whalen* v. *Baltimore & Ohio R. Co.,* 108 Md. 11; 69 Atl. 390; *Curran* v. *Holyoke Water Power Co.,* 116 Mass. 90;

Southern Ry. Co. v. *Franklin & P. R. Co.*, 96 Va. 693; 32 S. E. 485, cf. *Willard* v. *Tayloe*, 8 Wall. 557." (Italics supplied.)

See also:

Duncan Townsite Company v. *Lane*, 245 U. S. 308, 311;
Payne v. *United States*, 50 App. D. C. 219, 269 F. 871;
Morgan v. *Howard*, 54 App. D. C. 3, 293 F 650;
Seaboard Air Line Railway Company v. *Atlanta, B. & C. R. Co.*, 35 F. (2d) 609, (C.C.A. 5th Cir.)

CONCLUSION

We respectfully submit, in consideration of the findings of the trial justice, in consideration of our discussion of the principles of estoppel, and mandamus, and in view of the terms of Acts of Congress relating to fraternal beneficial associations and other insurance companies doing business in the District of Columbia, that the decision below is correct and the petition for writ of certiorari should be denied.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,

VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building.